

NOT DESIGNATED FOR PUBLICATION  
ARKANSAS COURT OF APPEALS  
D. P. MARSHALL JR., JUDGE

DIVISION II

CA06-782

20 June 2007

OLLIE COX,  
APPELLANT

v.

CEDAR CREEK and  
CRUM & FORSTER,  
APPELLEES

AN APPEAL FROM THE WORKERS'  
COMPENSATION COMMISSION  
(F309318)

SUPPLEMENTAL OPINION ON  
DENIAL OF REHEARING

Both sides have petitioned for rehearing, arguing (in different respects) that we should change our decision.

Appellees Cedar Creek, *et al.* contend that substantial evidence supports the Commission's decision to deny additional medical treatment for psychological problems caused in part by Cox's compensable injury. We have reconsidered but adhere to our original decision: the Commission needs to make additional findings on the issues outlined in our decision. We discern no conflict between our opinion and *Hope Livestock Auction Co. v. Knighton*, 67 Ark. App. 165, 992 S.W.2d 826 (1999), or any other precedent. We

therefore deny Cedar Creek, *et al.*'s petition.

Appellant Cox contends that we made a mistake of fact in our analysis of the temporary-total-disability issue. He further contends that, once we correct our mistake, we should reverse and hold that substantial evidence supports an award of these benefits.

Our opinion said:

It is undisputed that Cox had problems with his lower back throughout 2004. But problems do not equal total incapacity. Although Cox received treatment for his back problems throughout 2004, *the record contains no evidence that Cox could not work at all outside the dates given in the off-work slip.*

Slip Opinion at 4 (emphasis added). Cox is correct. He testified that, after he re-injured his back at home in April 2004, he was unable to work because of pain and side effects from prescribed muscle-relaxing medication. Our flat “no evidence” statement was mistaken. We should have written that the record contains no *medical* evidence that he was unable to work during the months in 2004 not covered by the off-work slip.

Our factual mistake, however, does not change the legal result. The question for this court is whether a fair-minded person could reach the Commission's conclusion based on the whole record. *Lee v. Dr. Pepper Bottling Co.*, 74 Ark. App. 43, 46, 47 S.W.3d 263, 265 (2001). To receive temporary total disability benefits, Cox had to prove by a preponderance of the evidence that he remained within his healing period and was totally incapacitated from earning wages. *Ark. State Hwy. & Transp. Dep't v. Breshears*, 272 Ark. 244, 246, 613 S.W.2d 392, 393 (1981). His testimony about his capacity for work is

relevant and important evidence. But so is all the medical evidence. A fair-minded person could, in light of the whole record, conclude that Cox was not completely unable to work except during the summer of 2004, during the period covered by the off-work slip from his treating physician.

There is simply no medical evidence of total incapacity during the other months, which was the basis for the Commission's decision. As we have held, there is nothing magic about an off-work slip. A claimant's testimony that he cannot work due to pain, however, is not necessarily dispositive, *Mad Butcher, Inc. v. Parker*, 4 Ark. App. 124, 132, 628 S.W.2d 582, 586 (1982), and the Commission was justified in ruling as it did based on Cox's failure to offer medical evidence that he was totally incapacitated during the relevant periods. *E.g. Jordan v. Tyson Foods, Inc.*, 51 Ark. App. 100, 103, 911 S.W.2d 593, 594–95 (1995).

Our review is not *de novo*. And precedent prevents us from second guessing the Commission where substantial evidence supports the decision below. It does so here on temporary total disability. We therefore deny Cox's petition, too.

PITTMAN, C.J., and MILLER, J., agree.